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No. [redacted] 5

In the Supreme Court of the United States

OCTOBER TERM, 1928

JOHN JOHNSON, PETITIONER

v.

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FLEET CORPORATION

U.S. GOVERNMENT PRINTING OFFICE : 1929

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OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 185) is reported in 24 F. (2d) 963. The charge to the jury by the District Judge appears at pages 167–178 of the Record.

JURISDICTION OF THIS COURT

The judgment sought to be reviewed was entered March 26, 1928. (R. 185.) Petition for certiorari was filed on June 22, 1928, and granted October 3, 1928.

THE QUESTIONS PRESENTED

1. Whether one who has no contractual relation with a ship, being a mere licensee or invitee, and

who is injured through failure of ship to provide a proper gangplank is prevented by his contributory negligence from recovery in an action brought at law, or is entitled under the rule in admiralty to an apportionment of damages.

2. Whether, if the admiralty rule applies, the action is barred because not brought within the two-year limitation period within which an action in admiralty could have been prosecuted.

STATUTES INVOLVED

Section 5 of the Suits in Admiralty Act (c. 95, 41 Stat. 525, U. S. C. Title 46, Sec. 745), which provides an exclusive remedy in admiralty against the Fleet Corporation, fixes a limitation period of two years. (*United States Shipping Board Emergency Fleet Corporation* v. *Rosenberg Bros.*, 276 U. S. 202.)

> * * * all other suits hereunder shall be brought within two years after the cause of action arises.

Section 33 of the Merchant Marine Act of 1920 (c. 250, 41 Stat. 988, 1007; U. S. C. Title 46, Sec. 688) provides:

> That section 20 of such Act of March 4, 1915, be, and is, amended to read as follows:
>
> "SEC. 20. That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all stat-

utes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

The Federal Employers' Liability Act of April 22, 1908 (c. 149, 35 Stat. 65; U. S. C. Title 45, Sec. 56), by Section 6, provides:

> No action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued.

Section 24 of the Judicial Code as amended (U. S. C. Title 28, Sec. 41, par. 3) provides:

> Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy where the common law is competent to give it, and to claimants for compensation for injuries to or death of persons other than the master or members of the crew of a vessel their rights and remedies under the workmen's compensation law of any State, District, Territory, or possession of the United

> States, which rights and remedies when conferred by such law shall be exclusive; of all seizures on land or waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize: *Provided,* That the jurisdiction of the district courts shall not extend to causes arising out of injuries to or death of persons other than the master or members of the crew, for which compensation is provided by the workmen's compensation law of any State, District, Territory, or possession of the United States.

Section 256 of the Judicial Code as amended (U. S. C. Title 28, Sec. 371, par. 3) provides:

> Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy where the common law is competent to give it and to claimants for compensation for injuries to or death of persons other than the master or members of the crew of a vessel, their rights and remedies under the workmen's compensation law of any State, District, Territory, or possession of the United States.

STATEMENT

Johnson was injured by falling off a gangplank stretched between two vessels owned by the United States then lying in navigable waters at Jacksonville, as he was attempting to pass from one vessel to the other. As locality is the sole test for deter-

mining jurisdiction in admiralty for tort losses, a libel in admiralty could have been maintained against the vessel or her owners to recover for his losses. However, he brought an action at law against the Fleet Corporation in the Supreme Court of the State of New York which was removed to the District Court of the United States for the Eastern District of New York. His complaint stated his status in relation to the vessels as follows (R. 3):

> That on or about the 1st of August, 1920, the Steamship *Jacksonville* was lying at the port of Jacksonville, Florida. That on or about that day, the plaintiff was invited by the boatswain of the Steamship *Jacksonville* to go on board the said vessel in order to procure or attempt to procure employment as a member of the crew of that vessel.

Johnson claims he went to look after a job as ship carpenter, but the vessel then had a ship carpenter. (R. 142.) There is evidence he had been drinking (R. 134), although this is denied. While leaving the vessel he fell in the water, sustaining his injuries. He had no contractual relation with the ship. The conclusive testimony is (Johnson, R. 42):

> Q. Did you get a job on board the *Jacksonville* that day?
>
> A. No.
>
> Q. You never had a job on the *Jacksonville*?
>
> A. No.

Q. Never were hired?

A. No.

Q. Never were employed on it?

A. No.

Q. You went on of your own accord—your own business?

A. With the boatswain to hire.

Q. You went on looking for a job?

A. Yes, sir.

Q. You went on to get something for yourself, a job?

A. Yes, sir.

Q. You were out of a job at the time, weren't you?

A. Yes.

The gangplank from which Johnson fell had been in use before and afterwards by the ship's crew (about 40) and shipyard employees (about 40) engaged in making repairs aboard the vessel (R. 120, 135, 136). The accident happened on August 1, 1920. The suit at law was begun March 29, 1923 (R. 2).

Johnson had no contractual relation with the ship or her owners. He was a licensee or an invitee. The District Judge left it to the jury to say which he was. (R. 172.) The Circuit Court of Appeals held Johnson was an invitee. (R. 185.)

The trial court charged the jury that contributory negligence of the plaintiff would bar recovery. The jury found for the defendant. The Circuit Court of Appeals affirmed per curiam on the authority of *Belden* v. *Chase,* 150 U. S. 674; *Atlee* v.

Packet Co., 21 Wall. 389, and *Maleeney* v. *Standard Shipbuilding Company*, 237 N. Y. 250. (R. 185.)

The application for certiorari which this Court granted suggested Johnson is to be classed as a seaman and his rights determined by the maritime law, which apportions damages although the seaman may be guilty of contributory negligence (*Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372).

SUMMARY OF THE ARGUMENT

1. Under the rule stated in the cases of *Belden* v. *Chase* and *Atlee* v. *Packet Co.* (*supra*), which have not been expressly overruled by this Court, contributory negligence bars Johnson's right to recovery in a common law action. Had Johnson been employed as a seaman, his rights would have been ascertained by maritime rules, as his employment or contract would have been maritime and have a direct relation to commerce and navigation in its international and interstate relation. Johnson was not employed as a seaman nor did he have any contractual relations with the ship or her owners. The accident happened on navigable waters, which fact alone gave him the election to proceed in admiralty. His accident is one of *local concern* and common law principles of liability control.

2. Even assuming his rights are to be determined by maritime law, as such rights must be asserted in admiralty within two years after they arose, and as this action was brought more than two years afterward, the action is barred.

3. As this action is against the Fleet Corporation whose relation to the vessels involved is as a public agent of the United States, and as the loss happened through the negligence of the officers and crew of Government vessels, the action can not be maintained against the Fleet Corporation, as a public agent is not responsible for the negligence of subagents or servants or other persons properly employed by or under him, in the discharge of his official duties.

ARGUMENT

I

It is admitted that Johnson could have brought an action in admiralty, as the injuries were sustained upon navigable waters. Locality is the test. He did not elect to do so but brought his action at common law. Admittedly, as he was guilty of contributory negligence, if the rule in *Belden* v. *Chase*, 150 U. S. 674, and *Atlee* v. *Packet Co.*, 21 Wall. 389, still is law, the ruling of both lower courts was correct. That rule is:

> But the plaintiff has elected to bring his suit in an admiralty court, which has jurisdiction of the case, notwithstanding the concurrent right to sue at law. In this court the course of proceeding is in many respects different and the rules of decision are different. The mode of pleading is different, the proceeding more summary and informal, and neither party has a right to trial by jury. An important difference as regards this case is the rule for estimating the damages.

> In the common-law court the defendant must pay all the damages or none. If there has been on the part of plaintiffs such carelessness or want of skill as the common law would esteem to be contributory negligence, they can recover nothing. By the rule of the admiralty court, where there has been such contributory negligence, or in other words, when both have been in fault, the entire damages resulting from the collision must be equally divided between the parties. This rule of the admiralty commends itself quite as favorably in its influence in securing practical justice as the other, and the plaintiff who has the selection of the forum in which he will litigate, cannot complain of the rule of that forum.
>
> It is not intended to say that the principles which determine the existence of mutual fault on which the damages are divided in admiralty, are precisely the same as those which establish contributory negligence at law that would defeat the action. Each court has its own set of rules for determining these questions, which may be in some respects the same, but in others vary materially. (*Atlee* v. *Packet Co.*, 21 Wall. 395.)

Our exhaustive research of the cases in this Court since those cases suggests that this Court since has not been asked to apply maritime principles and rules in common law tort actions, which, apart from the mere circumstance of locality, involved no contractual relation, or were in no respect maritime. In every case where the exclusive feature of the

maritime law has been applied to common law actions and to state legislation, in addition to the circumstance of locality, there has been a maritime contractual relation between the injured party and the vessel or her owners and the work upon which the injured party was engaged was maritime in its nature. It had direct relation to commerce and navigation. It is to be conceded, we believe, that these factors are not present in this case. Johnson was a licensee or invitee. He had no contractual relation to the ship; he was not engaged in a maritime employment when injured. As he was not a seaman, he could not claim the benefits of the various seamen's acts nor secure relief under the Jones Act.

The passage of Workmen's Compensation legislation by the States has led to a new development of the doctrine of uniformity in the application of maritime law. The need of uniformity was invoked to deny the application of State statutes to maritime injuries and has been extended to common law actions involving injuries happening upon navigable waters to seamen, stevedores, ship repairmen, then employed in maritime service and having a contractual relation directly or indirectly with the vessel involved.

Southern Pacific Co. v. *Jensen* (Stevedore), 244 U. S. 205.

Chelentis v. *Luckenbach S. S. Co.* (Seaman), 247 U. S. 372.

Knickerbocker Ice Co. v. *Stewart* (Bargeman), 253 U. S. 149.

Western Fuel Co. v. *Garcia* (Stevedore), 257 U. S. 233.

Grant Smith-Porter Co. v. *Rhode* (Carpenter at work on uncompleted ship), 257 U. S. 469.

State Industrial Commission of the State of New York v. *Nordenholt Corp.* (Longshoreman), 259 U. S. 263.

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Robins Drydock & Repair Co. v. *Dahl* (Ship repairman), 266 U. S. 449.

Union Fish Co. v. *Erickson* (Master's contract), 248 U. S. 308.

Smith and Son v. *Taylor* (Stevedore), 276 U. S. 179.

Northern Coal & Dock Co. v. *Strand* (Stevedore), No. 41, October Term, 1928. Decided Dec. 10, 1928, unreported.

The review of these cases suggests these deductions.

The rule is stated:

> And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and

> uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself * * *. (*Southern Pacific Co.* v. *Jensen,* 244 U. S. 216.)

The matters in controversy there are determined to be of general rather than local concern. As matters of general concern, the rights of the parties are dependent solely upon the maritime law. It is recognized that uniformity is not required throughout the entire field of admiralty jurisdiction but only as to the characteristic features of the general maritime law in its essential international and interstate relations. Where, however, the tort is purely of local concern, state statutes and the rule of common law courts apply because they "do not work material prejudice to the characteristic features of the general maritime law or interfere with its uniformity." (*Sultan Railway Co.* v. *Department of Labor,* 277 U. S. 135.)

Additional recent cases applying the local rule are:

Alaska Packers Assoc. v. *Accdt. Comm.,* 276 U. S. 467.

Millers' Underwriters v. *Braud,* 270 U. S. 59.

Grant Smith-Porter Ship Co. v. *Rhode,* 257 U. S. 469.

Daniel Toland's case, 1927 A. M. C. 887.

Eclipse Mills Co. v. *Dept. of Labor,* affirmed under name of *Sultan Railway Co.* v. *Dept. of Labor, supra,* 1927 A. M. C. 432.

This latter rule is controlling here. There is no contractual relation, maritime or otherwise, between Johnson and the ship and/or her owners. Therefore, he was not entitled to maintenance and cure which his maritime contract of seaman would entitle him to. He has no benefits under the various Seamen's Acts, including the Jones Act. He was only a seaman by vocation. His passage to and from a vessel looking for employment is a matter of his personal concern. We do not understand upon what theory the conclusion could be stated that to apply the common law rules of liability to an accident of a local nature such as this necessarily would work material prejudice to any characteristic feature of the general maritime law or interfere with the proper harmony or uniformity of that law in its international and interstate relations, which is the reason for the general doctrine.

With respect to maritime torts where there is no contractual relation and/or which are to be characterized as local in kind, the common law rule applies as stated in *Belden* v. *Chase; Atlee* v. *Packet Co., supra,* and the ruling of the Circuit Court of Appeals is correct.

The rule is thus stated in Benedict's Admiralty (5th Ed. pp. 32, 33):

> Apart at least from an Act of Congress—and to avoid a question of its constitutional-

ity, this will be construed if possible to intend a uniform rule at law and in admiralty—the substantive rights conferred by maritime law must be recognized equally in an action brought at common law, whether in Federal or State courts, upon maritime contract or even for tort, where there is a contractual relation between the parties so that the contract contemplates the application of the maritime law to the breach of duty and the maritime law prescribes the measure of recovery and the apportionment of damages in case of contributory negligence. In the case of stevedores, though it has been said that even in admiralty the employer's liability is determined upon common law principles, the maritime rule that contributory negligence goes only to the reduction of damages must be applied in an action at law against the employer.

In actions in tort between parties having no contractual relation the common law courts apply their own rules respecting the amount of recovery and the effect of contributory negligence. Thus, in collision cases, the common law court applies the common law rule that joint fault bars recovery instead of the maritime rule of divided damages. There is therefore a distinction between cases involving contractual relation and cases of simple tort independent of such relation. In cases of contractual relation even though of tortious injury, as there is but one contract, its effect should be the same

> in all courts and the measure and conditions of recovery which the contract contemplates should be applied alike at law and in admiralty. In cases, however, where there is no relation between the parties but that one has inflicted and the other sustained injury, the courts have not to consider what obligation their contract contemplated but only what redress justice requires and different courts may follow variant notions of what is just.

II

Assuming Johnson's rights are to be measured by the maritime law, this action is barred upon limitation grounds because not brought within two years. The accident happened August 1, 1920, and his action was not begun until March 29, 1923. The proceeding is against the Fleet Corporation. Its answer properly pleads limitation. (R. 6.) This Court has definitely ruled that the Suits in Admiralty Act (*supra*) which fixes the two year limitation period provides the exclusive remedy in admiralty against the Corporation. (*Fleet Corporation* v. *Rosenberg Bros.*, 276 U. S. 202.) If Johnson had had a contractual relation as seaman with the vessel, his rights (and the rights of stevedores and ship repairman are to be measured accordingly) would have been measured by the provisions of the Jones Act, which requires suit to be brought within two years. The Jones Act incorporates the terms of the

Federal Employers' Liability Act (*supra*) which by Section 5 fixes the two year limitation period. *Northern Coal and Dock Company* v. *Strand* (October Term, 1928, No. 41) decided by this Court December 10, 1928. The converse has been definitely ruled by this Court which has applied to admiralty actions for death, based upon State statutes, the limitation periods fixed by such statutes (*Western Fuel Co.* v. *Garcia,* 257 U. S. 233). This Court said (p. 242):

> It is admitted that under the circumstances here presented suit against petitioner, if instituted in a court of that State, would have been barred, and we are of opinion that the same limitation must be enforced in respect of the admiralty proceeding * * *.
>
> "The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all * * *."

The time within which the action would have been brought either under authority of the Suits in Admiralty Act or under the Jones Act is a limitation of the liability itself and not of the remedy alone. The period of time within which an action may be commenced is a material element in (such) uniformity of operation. *Engel* v. *Davenport,* 271 U. S. 33, 39.

It follows the action brought at law must be dismissed upon limitation grounds.

III

The vessels involved are owned and operated by the United States in execution of the purpose specified in Sections 1 and 12 of the Merchant Marine Act of June 5, 1920 (c. 250, 41 Stat. 988, U. S. C., Title 46, Secs. 861, 871).[1] The answer (R. 5) pleads that the United States owned the *Jackson-*

[1] SEC. 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That it is necessary for the national defense and for the proper growth of its foreign and domestic commerce that the United States shall have a merchant marine of the best equipped and most suitable types of vessels sufficient to carry the greater portion of its commerce and serve as a naval or military auxiliary in time of war or national emergency, ultimately to be owned and operated privately by citizens of the United States; and it is hereby declared to be the policy of the United States to do whatever may be necessary to develop and encourage the maintenance of such a merchant marine, and, in so far as may not be inconsistent with the express provisions of this Act, the United States Shipping Board shall, in the disposition of vessels and shipping property as hereinafter provided, in the making of rules and regulations, and in the administration of the shipping laws keep always in view this purpose and object as the primary end to be attained.

SEC. 12. That all vessels may be reconditioned and kept in suitable repair and until sold shall be managed and operated by the board or chartered or leased by it on such terms and conditions as the board shall deem wise for the promotion and maintenance of an efficient merchant marine, pursuant to the policy and purposes declared in sections 1 and 5 of this Act; and the United States Shipping Board Emergency Fleet Corporation shall continue in existence and have authority to operate vessels, unless otherwise directed by law, until all vessels are sold in accordance with the provisions of this Act, the provision in section 11 of the "Shipping Act, 1916," to the contrary notwithstanding.

ville and that the Fleet Corporation did not own or operate the vessel and the proceedings were barred by the Suits in Admiralty Act which provided an exclusive remedy and the limitation clause of which Act barred any proceeding at law. At the trial (R. 68), the operating agreement showing the Fleet Corporation's relation to the vessel was offered in evidence but it is not printed in the record. However, it has been definitely ruled by this Court that the services of the Corporation with respect to the operation of Government merchant vessels were obviously of a public nature and conducted on behalf of the United States. In *Emergency Fleet Corporation* v. *Western Union,* 275 U. S., at page 422, it is stated:

> But in operating vessels, as in making sales, the Shipping Board and the Fleet Corporation were required by the Merchant Marine Act to proceed with a view to aiding in the development of an adequate merchant marine to serve, among other things, "as a naval and military auxiliary in time of war or national emergency, ultimately to be owned and operated privately by citizens of the United States." These services of the Fleet Corporation were obviously of a public nature. It has never done any business, or conducted any operation, except on behalf of the United States.

The vessels here involved are owned and operated by the United States in execution of the purpose specified in Sections 1 and 12 of the Merchant Ma-

rine Act (*supra*), and the operation is to be declared a function of Government. (*The Pesaro,* 271 U. S. 562.) The Fleet Corporation is declared to be a public agent. As the Fleet Corporation can not be held for the default or negligent acts of its subagents or the master or crew of Government-operated vessels, its exemption from liability falls squarely within the rule announced in *Robertson* v. *Sichel,* 127 U. S. 507, 515:

> A public * * * agent is not responsible for the misfeasances or positive wrongs, or for the nonfeasances, or negligences, or omissions of duty, of the subagents or servants or other persons properly employed by or under him, in the discharge of his official duties. Story on Agency, 319.

This rule is the basis of similar decisions in *Hodgson* v. *Dexter,* 1 Cranch 345; *Parks* v. *Ross,* 11 How. 362; *District of Columbia* v. *Camden Iron Works,* 181 U. S. 453, as applied to contractual obligations. The Masters and seamen who are responsible for the safety of the gangplank employed upon Government vessels are employees of the Government (34 Op. A. G. 363). If an actionable wrong was committed, liability rests with the Government. The Government is responsible to pay judgments entered against the Fleet Corporation. Proceedings against the Fleet Corporation are in substance and effect actions against the Government under the doctrine of *Minnesota* v. *Hitchcock,* 185 U. S. 373, 387, and *Wells* v. *Roper,* 246 U. S. 335.

The Suits in Admiralty Act refers to corporations all of the stock of which is owned by the United States, and in Section 2 provides that "a libel in personam may be brought against the United States or against such corporation, as the case may be."

This provision contemplating suits against the Fleet Corporation was no doubt intended to cover cases where the Fleet Corporation, acting in its corporate capacity and interest, and in its own name, incurred obligations as in *Sloan Shipyards Corp.* v. *Fleet Corporation,* 258 U. S. 549, and not a case like this where the Fleet Corporation has acted as agent for the United States.

As the Fleet Corporation in the matters here involved was a public agent, and the alleged accident resulted from negligent acts of the officers or crew of a Government vessel, recovery can not be had against the Fleet Corporation in the present action. Recovery can be had only by authority of the Suits in Admiralty Act.

WILLIAM D. MITCHELL,
Solicitor General.

GEORGE R. FARNUM,
Assistant Attorney General.

J. FRANK STALEY,
Chief Attorney.

CHAUNCEY G. PARKER,
General Counsel,
Emergency Fleet Corporation.

FEBRUARY, 1929.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FLEET CORPORATION ON REARGUMENT

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Constitution, Art. III, sec. 2 ---- 12

In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 5

JOHN JOHNSON, PETITIONER

v.

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FLEET CORPORATION ON REARGUMENT

This cause, which is before this Court on a writ of certiorari, was argued at the last term and restored to the docket for reargument and set down for hearing with No. 32, *United States Shipping Board Merchant Fleet Corporation* v. *Lustgarten* (the two cases to be argued as one). Argument was specially invited on the following questions:

1. Is the United States Shipping Board Merchant Fleet Corporation, as an agency of the United States, immune from suit for the tortious acts of persons whom it has employed to carry on the operation of merchant vessels of the United

States, and who have been selected by it with due care?

2. Are the remedies given against the United States Shipping Board Emergency Fleet Corporation by the Suits in Admiralty Act of March 9, 1920, exclusive of all other remedies, whether at law or in admiralty, for liabilities of the Fleet Corporation growing out of the operation of merchant vessels of the United States?

3. Is the two-year period of limitation prescribed in the Suits in Admiralty Act applicable to the present suit?

THE STATUTES INVOLVED

The pertinent provisions of the statutes involved—the Merchant Marine Act of June 5, 1920, c. 250, 41 Stat. 988, 993, 1007 (U. S. C., Title 46, Secs. 861, 871, 886), and the Suits in Admiralty Act of March 9, 1920, c. 95, 41 Stat. 525–528 (U. S. C., Title 46, Secs. 741 et seq.)—are copied on pages 3 to 10 of the brief for petitioners in the *Lustgarten case,* No. 32.

STATEMENT

The petitioner brought an action in the Supreme Court of the State of New York on March 29, 1923. (R. 2.) The only defendant was the Fleet Corporation. (R. 2–3.) The cause was removed to the United States District Court for the Eastern District of New York, and was tried before a jury, which rendered a verdict for the defendant. (R. 178.)

The complaint alleged, and there was evidence tending to show, that on August 1, 1920, the petitioner, Johnson, sustained injuries from falling off a gangplank stretched between two vessels lying at the port of Jacksonville, Florida. (R. 3, 9–12.) There was also evidence tending to show that Johnson had gone on to one of these vessels, the S. S. *Jacksonville,* at the invitation of the boatswain to see the chief officer in order to obtain employment as a member of the crew. (R. 9.)

The complaint alleged that "the defendant owned, operated, managed, and controlled an American merchant vessel known as the S. S. *Jacksonville.*" (R. 3.) The answer of the defendant denied this allegation and alleged that the *Jacksonville* was a "merchant vessel belonging to the United States of America and duly documented and registered in the name of the United States of America." (R. 4.) Counsel for the defendant refused to stipulate that the Fleet Corporation was operating the ship, "because it was not." (R. 56.) The transcript of record in this Court seems to contain no evidence to support the allegations of the complaint. Copies of the pay roll of the *Jacksonville,* covering the period from July 30th to August 5th, 1920, and of the contract under which the vessel was operated were introduced in evidence. (R. 56, 68.) Nothing, however, appears in the record as to the contents of these exhibits. We contend that these exhibits, if considered, show that the Fleet Corporation acted only as agent of the

United States. The charge of the trial judge to the jury did not mention this point. (R. 167–177.)

The issues which the trial court left to the jury were whether there was negligence in the construction of the gangplank; whether Johnson was guilty of contributory negligence; and whether he was a mere licensee or an invitee. The court charged the jury that if Johnson was "guilty of contributory negligence then he could not recover." (R. 171.)

The counsel for the plaintiff requested that the court "charge the jury the rules on the question of contributory negligence as to this maritime law," and took an exception to the court's refusal to do so. (R. 178.) This was assigned as error in assignment of errors which were argued before the Circuit Court of Appeals. (R. 181.) That court held that contributory negligence was an absolute bar to recovery. (R. 185.)

The defendant's answer pleaded in bar of the plaintiff's recovery that any remedy which the plaintiff might have was founded exclusively upon the Suits in Admiralty Act and that the action was barred because not brought in two years. (R. 5, 6.) The record does not show any decision or discussion of this matter by either of the courts below, but obviously the District Court must have overruled both of these defenses.

SUMMARY OF ARGUMENT

1. No connection of the Fleet Corporation with the vessel is shown except what appears by an

agreement for operation of the vessel and statutes. The Fleet Corporation made the operating agreement only as an agent for the United States of America. There is no evidence that the crew were not selected with due care. On these assumptions, the Fleet Corporation has complete defenses in that it did not owe Johnson the duty for neglect of which he sued and also that it was the agent of the United States performing a public function. The Merchant Marine Act of 1920 in substance declares the operation of merchant vessels of the Shipping Board to be a function of Government and expressly directs that "the Fleet Corporation shall continue in existence and have authority to operate vessels." Since the passage of this Act the Fleet Corporation has been the agency through which the Shipping Board has performed its principal functions, and Congress has made annual appropriations for the maintenance and operation of Shipping Board vessels and for the expenses of the Fleet Corporation. The Suits in Admiralty Act provides that any final judgment rendered in any suit authorized by that Act, even though brought against the Fleet Corporation, shall be paid out of the Treasury of the United States. A public agent is not responsible for omissions of duty of servants properly employed by him or it in the discharge of his or its official duties.

2. No action at law lies against the Fleet Corporation for the tort complained of in the instant

case, as the remedy given by the Suits in Admiralty Act is exclusive of all other remedies against the Fleet Corporation on all causes of action arising out of the operation of merchant vessels owned by the United States for which a proceeding in admiralty could be maintained if the vessel were privately owned. Johnson had a remedy in admiralty for the tort complained of (if he had any right of action against the Fleet Corporation), but he brought an action at law. This Court has held in *Fleet Corporation* v. *Rosenberg Bros.*, 276 U. S. 202, that the Suits in Admiralty Act furnishes the exclusive remedy in admiralty against the United States and the Fleet Corporation on all maritime causes of action arising out of the possession or operation of merchant vessels owned by the Government. Although it has refrained from expressing an opinion on the precise question raised here, the considerations which led to the decision in the *Rosenberg case* would seem to apply equally to actions at law for maritime torts. If the Act is to provide a uniform system for administration of actions arising out of the operation of Government merchant vessels, the same procedure and the same period of limitation must apply to all proceedings. Where Congress has undertaken to regulate a whole subject, its legislation necessarily is exclusive and the statutory remedy bars an action at common law which might have been brought but for such legislation.

Section 18 of the Merchant Marine Act of June 5, 1920, has no application to the points made in either of the two preceding paragraphs. The contention that Congress could not prevent resort to a common law action for a maritime tort is also unsound. In cases to which the admiralty jurisdiction extends, Congress may rightfully vest exclusive jurisdiction in the Federal courts. Congress may also regulate and restrict actions against the United States and its agents.

3. It may be argued that even if the Suits in Admiralty Act is held not to furnish the exclusive remedy for the liability of the Fleet Corporation in the instant case, nevertheless the two-year period of limitation prescribed in that Act is applicable to the present suit, but we believe that the better view is that that limitation period is not applicable unless the Suits in Admiralty Act does furnish the exclusive remedy. If this conclusion is sound, it furnishes a strong ground in holding that the Suits in Admiralty Act does furnish the exclusive remedy.

4. The defenses argued above are properly before this Court. They were raised by the defendant's answer to the complaint. Moreover, the defense of the exclusiveness of the remedy under the Suits in Admiralty Act goes to the jurisdiction of the District Court, and consequently may be raised at any time.

5. Under the rule stated in the cases of *Belden* v. *Chase*, 150 U. S. 674, and *Atlee* v. *Packet Co.*, 21

Wall. 389, which have not been expressly overruled by this Court, contributory negligence bars Johnson's right to recovery in a common law action.

ARGUMENT

I

THE FLEET CORPORATION, AS AN AGENT OF THE UNITED STATES, IS NOT LIABLE FOR THE TORTIOUS ACTS OF PERSONS WHOM IT HAS EMPLOYED TO CARRY ON THE OPERATION OF MERCHANT VESSELS OF THE UNITED STATES AND WHO HAVE BEEN SELECTED BY IT WITH DUE CARE

As we have pointed out above, the printed record which is before this Court is barren as to the relationship of the Fleet Corporation to the vessel. (P. 3, *supra*).

Counsel for defendant at the conclusion of the evidence moved to dismiss the complaint "on the ground that the plaintiff has failed to establish facts sufficient to constitute a cause of action against the defendant and on the ground that he has failed to show any negligence on the part of the defendant." (R. 167.)

We contend that it is not shown that the Fleet Corporation owed Johnson the duty for neglect of which he sued. (See pp. 17–18 of the brief for the petitioners in the *Lustgarten case.*)

The operating agreement (introduced in evidence as Plaintiff's Exhibit 11 (R. 68), but not copied in the record before this Court) is similar to, although not in the identical form of, the contract involved in the *Lustgarten case* which is con-

sidered on pages 18 to 26 of brief for petitioners in the *Lustgarten case*. In making both contracts the Fleet Corporation acted only as agent of the United States.

There is no evidence that the crew were not selected with due care.

Our argument on the question of public agency is substantially identical with that made in Point II, pages 26 to 30 of brief for petitioners in the *Lustgarten case*. In the instant case the operating agent is not a party and consequently only the Fleet Corporation is to be considered.

See also page 7 of brief for the Fleet Corporation in the *Royal Insurance Co. case,* No. 123, October Term, 1929.

The brief filed in behalf of Johnson and Lustgarten contends that the Fleet Corporation is liable for the tortious acts of members of the crews of vessels owned by the Government. In view of our argument in the brief for petitioners in the *Lustgarten case,* it seems unnecessary to answer in detail the arguments in our opponent's brief. One argument which our brief in the *Lustgarten case* does not cover is based upon the reenactment of Section 9 of the Shipping Act of 1916, by Section 18 of the Merchant Marine Act of June 5, 1920. But we submit that this section has no bearing whatever upon this point. It did not, of course, repeal the Suits in Admiralty Act, Section 8 of which provides that final judgments in suits against the Fleet Corpora-

tion under that Act shall be paid out of the Treasury. The introductory recital in the Merchant Marine Act of June 5, 1920, itself shows that it was contemplated that the temporary operation of the merchant vessels should be a function of the Government, and Section 12 of the Act provides:

> That all vessels may be reconditioned and kept in suitable repair and until sold shall be managed and operated by the board or chartered or leased by it on such terms and conditions as the board shall deem wise for the promotion and maintenance of an efficient merchant marine, pursuant to the policy and purposes declared in sections 1 and 5 of this Act; and the United States Shipping Board Emergency Fleet Corporation shall continue in existence and have authority to operate vessels, unless otherwise directed by law, until all vessels are sold in accordance with the provisions of this Act.

Section 18 of that Act, reenacting Section 9 of the Shipping Act of 1916, does not purport to modify any rule of law applicable to public agents or in any way refer to the Fleet Corporation.

II

THE REMEDIES GIVEN AGAINST THE FLEET CORPORATION BY THE SUITS IN ADMIRALTY ACT OF MARCH 9, 1920, ARE EXCLUSIVE OF ALL OTHER REMEDIES, WHETHER AT LAW OR IN ADMIRALTY, FOR LIABILITIES OF THE FLEET CORPORATION GROWING OUT OF THE OPERATION OF MERCHANT VESSELS OF THE UNITED STATES

The cause of action upon which Johnson sued occurred on August 1, 1920. (R. 5, 9–12.) The

action was not brought until March 29, 1923. (R. 2.) The question of the statute of limitation is consequently involved. We submit that the remedy in admiralty given by the Suits in Admiralty Act was the exclusive remedy of any kind which was open to Johnson. This point was expressly raised in the defendant's answer. (R. 4–5.) Johnson might have pursued that remedy, but he did not. The action which he brought was in the State court (R. 2), and the trial was before a jury in the Federal court to which the case was removed. (R. 178.)

The argument under this point in this case is set forth in pages 31 to 39 of brief for petitioners in the *Lustgarten case*. No question in regard to the Jones Act is involved in the instant case, as Johnson was not a seaman who was suing his employer, but according to his own testimony he was leaving the vessel on which he had gone to look for work at the suggestion of the boatswain. (R. 42.)

The brief of Johnson and Lustgarten on this point also relies on Section 18 of the Merchant Marine Act of June 5, 1920, and states that that section shows "a continuing intention to place the Fleet Corporation * * * on the same general basis as private shipping companies operating private merchant vessels." The conclusive answer to this is that Section 18 does not mention the Fleet Corporation or in any way refer to it. This is in marked contrast to other parts of the Merchant Marine Act, which expressly mention the Fleet Corporation,

and the provisions of the Suits in Admiralty Act which refer to "any corporation in which the United States or its representatives shall own the entire outstanding capital stock." It is clear that Section 18 was not intended to modify the Suits in Admiralty Act or restrict its operation. Otherwise, it would have had the effect of permitting the seizure of vessels owned by the Government and of giving remedies against the United States and the Fleet Corporation in admiralty other than those prescribed in the Suits in Admiralty Act.

The brief of Johnson and Lustgarten contends that "Congress has no right to declare that a citizen shall be deprived of a common law action and the right of trial by jury which he has concurrently with the remedy *in personam* in Admiralty against the Fleet Corporation by declaring that he must proceed, if at all, only in admiralty and without right of trial by jury." We submit that this is unsound, as is also the assertion that "In saving the common law remedy of 1789, Congress saved it because it could not or deemed it could not have taken it away." The Constitution provides that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction" and contains no reservation of common law remedies. (Art. III, sec. 2) As this Court said in *The Moses Taylor*, 4 Wall. 411, 429:

> the learned justice observes, in conclusion, that it is manifest that the judicial power of the United States is in some cases un-

> avoidably exclusive of all State authority, and that in all others it may be made so at the election of Congress. We agree fully with this conclusion. The legislation of Congress has proceeded upon this supposition. The Judiciary Act of 1789, in its distribution of jurisdiction to the several Federal courts, recognizes and is framed upon the theory that in all cases to which the judicial power of the United States extends, Congress may rightfully vest exclusive jurisdiction in the Federal courts. * * *

In *Panama R. R. Co.* v. *Johnson,* 264 U. S. 375, 386, 390, this Court said in a discussion of the maritime law:

> After the Constitution went into effect, the substantive law theretofore in force was not regarded as superseded or as being only the law of the several States, but as having become the law of the United States,—subject to power in Congress to alter, qualify or supplement it as experience or changing conditions might require. When all is considered, therefore, there is no room to doubt that the power of Congress extends to the entire subject and permits of the exercise of a wide discretion. * * *
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> The course of legislation, as exemplified in § 9 of the Judiciary Act of 1789, §§ 563 (par. 8) and 711 (par. 3) of the Revised Statutes, and §§ 24 (par. 3) and 256 (par. 3) of the Judicial Code, always has been to recognize the admiralty jurisdiction as open to the

adjudication of all maritime cases as a matter of course, and to permit a resort to common-law remedies through appropriate proceedings *in personam* as a matter of admissible grace.

Moreover, the Suits in Admiralty Act applies only to cases against the United States or a corporation in which the United States or its representatives own the entire outstanding capital stock. We submit that there can be no question as to the power of Congress to change and restrict the remedies against the United States or corporations in which it is so vitally interested.

At the time of the passage of the Judiciary Act of 1789 and the adoption of the Seventh Amendment, there certainly was no right to any jury trial against the United States or against any corporation in which it owned the entire capital stock, and consequently neither the provisions of the "saving" clause or of the "trial by jury" clause have any application to cases against the United States or such corporations.

III

IS THE TWO-YEAR PERIOD OF LIMITATION PRESCRIBED IN THE SUITS IN ADMIRALTY ACT APPLICABLE TO THE PRESENT SUIT?

The following argument may be made in support of the contention that even if the remedy given by the Suits in Admiralty Act is not exclusive, nevertheless the two-year period of limitation prescribed in that Act is applicable:

Johnson insists that in his action at law he is entitled to the benefit of the maritime law allowing a division of damages where both parties are guilty of negligence. If his position is sound, it must be based upon the principle "that rights and liabilities in respect to torts upon the sea ordinarily depend upon the rules accepted and applied in admiralty courts which are controlling wherever suit may be instituted." See *Western Fuel Co.* v. *Garcia,* 257 U. S. 233, 241. If the principle of uniformity is broad enough to require an application of the admiralty rule of the division of damages, the same principle would seem to require uniformity in the time fixed for bringing suit on claims growing out of the operation of merchant vessels owned by the Government. What uniformity is there if the limitation which Congress placed upon bringing suit in the District Court in admiralty proceedings can be disregarded in another form of action tried in the United States District Court on the same cause of action? If the restriction is desirable and necessary for one class of cases, it is desirable and necessary for every class of cases. Somewhat analogous situations were presented in *Phillips* v. *Grand Trunk Railway Co.,* 236 U. S. 662, *Kansas City Southern Railway Co.* v. *Wolf,* 261 U. S. 133, *Western Fuel Co.* v. *Garcia,* 257 U. S. 233, *supra,* and in *Engel* v. *Davenport,* 271 U. S. 33, 39.

We are of the opinion, however, that as the limitation provision (Sec. 5) of the Act provides that

all suits "hereunder" (with an exception not here material) are to be "brought within two years after the cause of action arises," it does not apply to suits not brought "hereunder." If this is so, it is a strong reason for holding that the Act prohibits resort to any action at law on causes of action covered by the Act.

IV

THE DEFENSES ARGUED ABOVE ARE PROPERLY BEFORE THIS COURT

Johnson's brief filed in this Court contends that none of these defenses are properly before this Court for argument. On pp. 52–53 it states:

> If at the time the injuries occurred in these two cases it was acting in the capacity of a public agent of the United States, that was a matter of fact for the Fleet Corporation to prove and it has not done so. [*Fleet Corporation* v. *Sullivan*, 261 U. S. 146 (1922).] The court is simply limited by the record.

Paragraph "Second" of the complaint alleges that "the defendant owned, operated, managed, and controlled" the S. S. *Jacksonville*. (R. 3.) This allegation was denied by the answer. (R. 4.) Moreover, as a complete defense the answer alleged that the *Jacksonville* belonged to the United States, and that the action is in effect a suit against the United States, and whatever rights the plaintiff had are founded on the Suits in Admiralty Act. The answer also averred as a complete defense that the

Fleet Corporation did not own the vessel or control it under charter, and as another complete defense, that the action was not begun until more than two years after the cause of action arose. (R. 4–6.)

No testimony was introduced tending to show that the vessel was owned or operated by the Fleet Corporation. The only evidence on the point was the agency agreement for the operation of the vessel. (Plaintiff's Exhibit 11, R. 68.)

At the conclusion of the testimony, counsel for the defendant moved to dismiss the complaint on the ground that the plaintiff had failed to establish "facts sufficient to constitue a cause of action against the defendant and on the ground that he has failed to show any negligence on the part of the defendant." The motion was denied and the defendant was given an exception. (R. 167.)

The defense of the exclusiveness of the remedy under the Suits in Admiralty Act goes to the jurisdiction of the District Court, and consequently may be raised at any time. See *Nassau Smelting Works* v. *United States,* 266 U. S. 101, 106.

V

THE COURTS BELOW WERE CORRECT IN HOLDING THAT IF JOHNSON WAS GUILTY OF CONTRIBUTORY NEGLIGENCE IT BARRED HIS RIGHT TO RECOVER IN THE LAW ACTION WHICH HE BROUGHT

We do not wish to abandon this point, on which the Circuit Court of Appeals decided the case, and unless this Court has already decided it against us,

we refer to the argument under Point I, pages 8 to 15 of the brief for the Fleet Corporation filed at the hearing in the instant case last term, No. 220, October Term, 1928.

CONCLUSION

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed.

CHARLES E. HUGHES, Jr.,
Solicitor General.
GEORGE R. FARNUM,
Assistant Attorney General.
CLAUDE R. BRANCH,
Special Assistant to the Attorney General.
J. FRANK STALEY,
Chief Attorney.
CHAUNCEY G. PARKER,
General Counsel,
United States Shipping Board.
Of Counsel.

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